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Supreme Court of the United States

October Term, 1968

No. 914

THE NEW YORK CENTRAL RAILROAD COMPANY; ERIE-LACKAWANNA RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; THE LONG ISLAND RAIL ROAD COMPANY; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor; LEHIGH VALLEY RAILROAD COMPANY; BOSTON AND MAINE RAILROAD; THE DELAWARE AND HUDSON RAILROAD CORPORATION; THE BALTIMORE & OHIO RAILROAD COMPANY; and THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellants,

against

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York; and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; and LEONARD RUBENFELD, as District Attorney of Westchester County,

Respondents,

and

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,

Intervenors-Appellees.

On Appeal from the Court of Appeals of the State of New York

INTERVENORS-APPELLEES' MOTION AND BRIEF FOR AFFIRMANCE OR DISMISSAL UNDER RULE 16

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CASE CITED

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Intervenor-Appellees* move pursuant to Rule 16 of the Rules of this Court for affirmance on the ground that the

* As of January 1, 1969, the intervenors Brotherhood of Locomotive Firemen & Enginemen and Order of Railway Conductors & Brakemen merged with the Brotherhood of Railroad Trainmen and the Switchmen's Union of North America into the United Transportation Union.

question presented by the appellants on this appeal—the constitutionality of a state railroad full crew law—was correctly decided below and has been definitively decided only this Term by this Court in *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R. I. & P. R. Co.*, —— U. S. ——, 89 S. Ct. 323, 21 L. Ed. 2d 289, (Nov. 18, 1968) and accordingly is so unsubstantial as not to need further argument; and alternatively to dismiss the appeal on the ground that it presents no substantial federal question.

Statement

The statute here in question is Section 54-b of the New York Railroad Law which prohibits operation of "* * * any fuel-electric [i.e., diesel] engine, unless said engine shall be manned with a crew of not less than one engineer and one fireman or helper."

The complaint, served in 1961, attacked the constitutionality of this statute and in addition former Sections 54-a and 54-c of the Railroad Law (since repealed) as violative of the Due Process, Equal Protection and Commerce Clauses on the ground that (68a,* Complaint, par. 20):

> "The effect of said laws upon such [plaintiffs' railroad] operations is to compel plaintiffs to employ unnecessary firemen, brakemen, trainmen and baggagemen without regard to operating conditions, safety, efficiency or other factors proper or relevant for consideration in connection therewith."

After a lengthy trial, the Trial Court (per Hon. Gerald Nolan), upon detailed findings of fact, rejected the rail-

* Page references to appellants' "Appendiix to Jurisdictional Statement" begin with the letter "A". Page references to the printed Record are followed by the letter "a", e.g., 68a.

roads' contentions and concluded that the requirements of the stautes were rationally based in the promotion of safety. (A-1 et seq.; 46 Misc. 2d 68, 259 N. Y. S. 2d 76, Sup. Ct., Westchester Co. 1965.)

The Appellate Division, Second Department, affirmed, specifically affirming the findings of fact (A-57; 28 A. D. 2d 735, 282 N. Y. S. 2d 68, 2d Dept. 1967).

The New York Court of Appeals, in turn, has also affirmed. (A-58 et seq.; 23 N. Y. 2d 1, 241 N. E. 2d 730, 1968.) It should be noted that the Court of Appeals decision was handed down on October 10, 1968, more than a month before this Court's decision in *Brotherhood* v. *Chicago, R. I. & P. R. Co., supra.*

The sole question presented by the appellants in their Jurisdictional Statement (p. 4) is whether Section 54-b, as interpreted by the New York Court of Appeals, is "* * * UNCONSTITUTIONAL CLASS LEGISLATION."

The appellants fail to state anywhere in their Jurisdictional Statement the constitutional provision claimed to be involved in the appeal.

The Facts

The New York Court of Appeals has authoritatively construed the Section 54-b manning requirement of a "fireman or helper" in addition to the engineer on diesel locomotives. It held in the affirmative on the issue "whether Section 54-b must be read as requiring the assignment of an additional engine crew member to help the engineer, and

that this is not sufficiently met by the assignment of a front-end brakeman from the train crew;" (A-61, 65).

Appellants contend that, as so interpreted, the statute is "unconstitutional class legislation" because, as they state (p. 6):

> "* * * the Court of Appeals held that a brakeman cannot serve as a 'helper' to the engineer."

The basic factual predicate upon which appellants' argument is founded is, to put it bluntly, a flat misstatement of the Record and findings, and is repeated at least five times in their Jurisdictional Statement:

> 1. "* * * the indisputable fact [is] that brakemen are as qualified as firemen to act as helpers on such [diesel] locomotives." (p. 5)
>
> 2. "The proven, indisputable fact—not challenged by the Court of Appeals—is that firemen are sent out on the road with no more training or experience than brakemen." (p. 6)
>
> 3. "The undisputed fact of record is that firemen are no more assistant engineers than brakemen are. They are sent out on the road with no more training or experience than brakemen." (p. 8)
>
> 4. "The Court of Appeals ignored the conceded fact that firemen are required to have no more qualifications than brakemen or other operating personnel; * * *." (p. 13)
>
> 5. "What they [the appellants] do say is that given the conceded facts that brakemen receive the same training as firemen, * * *." (p. 22)

Far from being "proven," "indisputable" or "conceded," the Trial Court's affirmed findings of fact are (A-24-25):

> "The fireman is taught and required to learn about the mechanical operation of the locomotive, and the engine, as well as to acquaint himself with the electrical circuits and other features of the diesel-electric power plant. He is taught how to discover, and to some extent to correct, malfunctions in the operation of the locomotives, and customarily relieves the engineer at times and operates the locomotive under his supervision.
>
> "No training is given to the other members of the train crew with respect to the operation of the locomotive or the discovery or correction of malfunctions in its operation."

The evidence establishes that this unique training of the fireman commences at the outset of his employment. Each of the plaintiffs provides its newly hired fireman with a series of manuals covering the operation and mechanics of the diesel engine. These firemen's manuals are all in evidence.*

The New York Central, for a typical example, provides each newly hired fireman with a 237-page book entitled "Examination for Firemen or Helpers—First, Second and Third Series" (Ex. AE, 4761a); and also, a book entitled "New York Central Instruction for Operation of Diesel Electric Locomotives, All Classes" (Ex. AF). Each fireman is then required to take a series of progressive examinations on diesel mechanics and operation which are given

* Exs. AE, AF, BT, CG, CH, CI, CJ, CX, CY, CZ, DN, DU, EB, EP, EQ, ER, ES, EU, EW, FA, FC, FD, FE, FO, FP, FQ.

successively on the first, second and third anniversaries of his entering service (Ex. AE, 4767a; see also 4789a, 4824a). If the fireman fails to pass either of the first two examinations, he is dismissed from the service; with respect to the third examination, according to a New York Central witness:

> "If he passes it, he is a qualified engineer. If he doesn't pass it, we relegate him, as Mr. Kenefick said, a round house engineer, a hostler" (608a).

The Court is respectfully referred to the tables of contents of some of these firemen's manuals, indicating their breadth, which are reproduced in the Record (4763-7a, 4786-91a, 4821-5a, 4826-7a).

Appellants quote (pp. 8-10) from the testimony of New York Central Vice President Kenefick in support of their claim that the training and qualifications of brakemen are the same as firemen. But Mr. Kenefick testified on cross-examination to precisely the opposite effect (325a-326a):

> "Q. Mr. Kenefick, it is a fact, is it not, that the brakemen or let's say those in train service do not take any training whatever in the operation or mechanical functions of a Diesel engine? A. That's right.
>
> "Q. It is solely the fireman who gets that training? A. I know it is not the trainman.
>
> "Q. You have already identified this examination book, so you know it is the fireman, don't you? A. Yes.
>
> "Q. How many runs does it take and how much instruction does it take before a fireman can start operating a train? A. Before he starts to operate the train?
>
> "Q. Under the supervision of the engineer? A. I couldn't say. I think it would vary.
>
> "Q. You don't know anything about that? A. I said it would vary, widely.

"Q. Isn't it a fact that he begins to operate [390] in the yard service after his student runs; he begins under the supervision of the engineer to operate the engine? A. He does, yes."

The difference in training and qualifications between firemen and brakemen stems from the craft distinction which has always been recognized in railroading between the "engine crew" which consists of the engineer and the fireman, and the "train crew" which consists of the conductor, brakemen and baggagemen. The firemen are universally on the engineers seniority list and, accordingly, are trained and eventually qualify to act as engineers. On the other hand brakemen are trained in the functions of the train crew and eventually become conductors (263-4a).

As the Erie-Lackawanna's fireman's manual states (Ex. BT, 4788a):

"In order that an Engineer or Fireman may perform his duties successfully, he must have a thorough knowledge of the locomotive, both the operation and how to successfully meet the unexpected and adverse conditions when they arise.

"Engineers and Firemen will be required to familiarize themselves with all locomotives and locomotive devices in use on their divisions."

As a result of his training and qualifications, the fireman is able to perform duties which the brakeman is not trained and qualified to perform with respect to the relief of the engineer and the mechanics of the diesel engine. The Trial Court found:

As to the Fireman's Mechanical Functions

> "When conditions permit, the fireman, or helper, answers alarms from other units of the engine consist, and makes inspections to discover malfunctions for which there are no alarms." (A-25)

As to the Fireman's Relief Functions

> "It is also established * * * that the engineer's tour of duty often requires many hours of work, in snow, sleet or rain, and other adverse weather conditions, and the argument that temporary relief of the engineer by the fireman contributes to safety under such conditions is at least worthy of serious consideration. * * *
>
> "Moreover, in all types of service, he [the fireman] is the only employee in the cab who may be expected to be capable of relieving the engineer in case of fatigue or emergency." (A-26-27)

The railroads have never contended that they want to replace the fireman with an additional brakeman assigned solely to the engine crew, since this would not result in any saving to them. Rather, as the Court of Appeals noted (A-60), they want the head-end brakeman, in addition to his duties as such, to serve as the assistant to the engineer, which they concede the engineer must have. They state in their Jurisdictional Statement (pp. 6-7):

> "The Railroads do not now and never have claimed they intend to operate any diesel powered train, freight or passenger, without two men in the cab of the locomotive. It is the invariable practice and rule on the Railroads that the head brakeman ride in the cab of the locomotive on freight trains (32a; 509a; 4624a; 4629a; 4758a; 4785a). As the New York Court of Appeals

stated 'they [the Railroads] concede that in passenger trains where the front-end brakeman does not ride in the engine cab, there must be a helper specially assigned for the engineer and that in this effect on passenger train operation the statute is valid' (A-60)."

But in addition to his lack of training and qualification to assist the engineer in the operation and mechanics of the diesel, the head brakeman is, by reason of his duties as such, frequently outside the engine cab. The Trial Court so found (A-27):

> "The evidence establishes, and I find that in road freight service, particularly in switching operations, the head brakeman on frequent occasions is not in the cab of the locomotive, and the fireman is the only crew member in position to take and pass signals and to act as lookout on the left hand side. * * *
>
> "The evidence does not establish, nor do I find that the lookout and signal passing duties of the firemen in road freight service are unsubstantial or that they can be dispensed with without some sacrifice of safety."

The Court of Appeals, after referring to these factual findings, sustained the Trial Court's conclusion as follows (A-70, 23 N.Y. 2d at pp. 14-15):

> "The conclusion from all this was: 'Although there is room for argument, and the question may be fairly debatable, I do not find that it is unreasonable to require, as the full crew statutes do, that a second man be present in the locomotive cab, or that the second man shall have, in addition to ability to act as lookout and read and pass signals, the training and qualifications ordinarily possessed by firemen, which may make it

possible for him to be of assistance to the engineer in the operation of the locomotive.' (46 Misc.2d, pp. 87-88)

* * *

"The evidence is of sufficient legal effect to permit the Special Term to reach, and the Appellate Division to affirm the essential factual conclusion on which the decision for defendants is based."

ARGUMENT

POINT I

This Court's decision in *Brotherhood* v. *Chicago, R. I. & P. R. Co.* disposes of this appeal.

Precisely the same arguments presented on this appeal were before this Court just a few months ago in the Arkansas full crew law case. These arguments were summarized by the Court in its opinion as follows (21 L. Ed. 2d at p. 295):

"Although the railroads recognize that the fireman performs a valuable lookout function on passenger trains, where he and the engineer are the only crewmen in the engine cab, they assert that in both freight hauling operations and yard switching operations other railroad employees are available to provide an adequate lookout and assist the engineer in correcting mechanical problems and performing other miscellaneous duties. The railroads thus maintain that the firemen, and some of the other required crewmen, perform no useful function and make no significant contribution to safety. * * *

"The State of Arkansas and the railroad brotherhoods, all appellants here, take a different view of the

functions preformed by the firemen and other additional crewmen required under the statutes. They claim that the work performed by these employees—serving as lookout, passing signals, relieving the engineer in emergencies, inspecting the engine and other cars, and helping to make needed adjustments and repairs while the train is moving—is still necessary and cannot be performed by other employees without unduly burdening them and interfering with the proper performance of their other tasks."

Despite the findings of fact by the Arkansas 3-judge District Court, which fully supported the railroads' factual contentions, this Court sustained the constitutionality of the Arkansas laws. After noting (21 L. Ed. 2d at p. 296) that "* * * the statistics showed that railroad accidents had actually increased during the period from 1964-66, when the size of train crews was being reduced.", the Court summarized the findings of Arbitration Board 282,* particularly on the fireman issue, and then stated (21 L. Ed. 2d at p. 297):

"This summary, taken from evidence heavily relied upon by the railroads and generally favorable to their position, leaves little room for doubt that the question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives. The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support

* These findings have been heavily relied on and quoted in the courts below by the appellants, as they were by the railroads in the Arkansas case.

it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was 'pure speculation.' "

This conclusion applies *a fortiori* to the present case, in which the affirmed findings of fact below are not only directly contrary to the railroads' contentions, but amply support the New York Legislature's judgment to retain the engine crew requirements of Section 54-b when in 1966 it repealed the train crew requirements of former Sections 54-a and -c.

In the final paragraph of its decision, in language dispositive of this appeal, this Court made it clear that state full crew laws will not be invalidated by the courts (21 L. Ed. at p. 300):

"Under all the circumstances we see no reason to depart from this Court's previous decisions holding that the Arkansas full-crew laws do not unduly burden interstate commerce or otherwise violate the Constitution. Undoubtedly heated disputes will continue as to the extent to which these laws contribute to safety and other public interests, and the extent to which such contributions are justified by the cost of the additional manpower. These disputes will continue to be worked out in the legislatures and in various forms of collective bargaining between management and the unions. As we have said many times, Congress unquestionably has power under the Commerce Clause to regulate the number of employees who shall be used to man trains used in interstate commerce. In the absence of congressional action, however, we cannot invoke the judicial power to invalidate this judgment of the people of Arkansas and their elected representatives as to the price society should pay to promote safety in the railroad industry."

Conclusion

The intervenors-appellees' motion for summary affirmance or dismissal should be granted, with costs.

Respectfully submitted,

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